STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	)	
	)	
Petition to determine the applicability of Section 16-125(e) liability to summer 2011 storm damage	)	Docket No. 11-0588

PEOPLE OF THE STATE OF ILLINOIS'S
MOTION TO STRIKE THE TESTIMONY OF
COMED WITNESS PHILIP R. O'CONNOR

The People of the State of Illinois, by and through Lisa Madigan, Attorney General ("People" or "AG"), hereby move to strike the pre-filed testimony of Commonwealth Edison Company ("ComEd" or "Company") rebuttal witness Philip R. O'Connor in the above-captioned docket. As discussed below, the testimony of Mr. O'Connor constitutes improper legal opinion testimony by an industry consultant or lobbyist as to past legislative intent behind Section 16-125 of the Illinois Public Utilities Act ("Act"). This testimony should be stricken because violates of Part 200.610 of the Commission's Rules of Practice. In support of this Motion, the People state as follows:

I. Introduction

On March 30, 2012, ComEd submitted rebuttal testimony in this docket. This included testimony by Mr. O'Connor, President of PROactive Strategies, Inc., that testifies to his understanding of the legislative history behind Section 16-125 of the Act.

Despite his claims to the contrary, Mr. O'Connor's rebuttal testimony constitutes impermissible legal opinion as to the intention of the Illinois General Assembly in passing Section 16-125 of the Act. ComEd Ex. 6.0 at 1 ("I offer no legal argument. I leave that to

counsel and to briefs."). Mr. O'Connor repeatedly attempts throughout his *entire* rebuttal testimony to create legislative history surrounding the enactment of Section 16-125 by explaining *why* the General Assembly enacted that section of the Act. In one illustrative passage, Mr. O'Connor states that:

> I was centrally involved with the efforts culminating in the Illinois Electric Service, Customer Choice and Rate Relief Act of 1997 and in shaping its outlines and many of its provisions. I was aware of the negotiations between ComEd and the City of Chicago that led to the last minute addition of Section 16-125 to that bill. I was and am quite familiar with the circumstances that prompted its inclusion and I understood the connection between that provision and the reliability events of the preceding years.

ComEd Ex. 6.0 at 6. In fact, Mr. O'Connor goes so far as to conclude that his interpretations of historical events surrounding the passage of Section 16-125 in fact form the "historical foundation of Section 16-125." ComEd Ex. 6.0 p. 12; lines 196-199. Mr. O'Connor's testimony also suggests what the General Assembly knew or didn't know in passing Section 16-125. ComEd Ex. 6.0 p. 9-10; lines 206-211. All of these suppositions are highly interpretative.

During the period in question—the 1990s—Mr. O'Connor was Vice President of an electricity services company and founded an energy consulting firm. *Id.* at 3. Even if Mr. O'Connor had been a member of the Illinois General Assembly during that period of time, which he was not, his present day opinions would be inadmissible to explain legislative intent from twenty years ago. However, in offering this rebuttal testimony, ComEd boldly asks the Commission to accept statements by an industry lobbyist to retroactively explain the legislative intent of a law that directly regulates that lobbyist's business. The Commission should reject such a dangerous and irresponsible approach to statutory interpretation. Mr. O'Connor's testimony should be stricken in its entirety.

II. Testimony Regarding Past Legislative Intent Is Not Admissible.

It is a well-established principle of law that the testimony of a lawmaker regarding past legislative intent or deliberations is not admissible, and therefore it follows that the testimony of a bystander to the legislative process regarding past legislative intent must also be inadmissible. 2A N. Singer, Sutherland Statutory Construction §48.16 (5th Ed. 1992).

In construing a statute, it is improper to consider testimony regarding legislative intent given retroactively by members of the legislature that enacted the statute, as such testimony forms no part of the legislative history of the enactment. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (internal citation omitted)); *United States v. Chicago Bd. of Ed.*, 588 F. Supp. 132, 233 (N.D. Ill. 1984), *vacated on other grounds*, 744 F.2d 1300 (7th Cir. 1984). In *Chicago Board of Education*, the district court noted that a Representative's insertion of a "statement of his understanding" of a bill into the record after the House had adopted the legislation should not be used to determine statutory intent. 588 F. Supp. at 233. The court noted that the Representative had already failed to amend the bill before it had been adopted and was simply attempting to retroactively achieve the same goal through this "effort at revisionist history." *Id.* The court concluded that "it would be especially inappropriate now to impute [the legislator's belated] "understanding" to other members of Congress." *Id.*

Indeed, even in examining legislators' comments made contemporaneously to the passage of legislation, courts have declared that no single "legislator, or even a group of three legislators, has sufficient personal knowledge to declare the overall intent of a legislative body." *Foreman v. Dallas Cnty.*, 193 F.3d 314, 322 (5th Cir. 1999). Illinois courts similarly do not use opinions of individual lawmakers when made contemporaneously to a bill's passage in order to

determine statutory intent. *See People v. Burdunice*, 211 Ill. 2d 264, 270 (2004); *Atkins v. Deere & Co.*, 177 Ill. 2d 222, 243-33 (1997) ("[A] preamble constitutes a stronger expression of intent than does a passing comment made by a single legislator during legislative debates."). Instead, when Illinois courts look to comments made in contemporaneous legislative debates, they must look to those debates as a whole to determine legislative intent. *Morel v. Coronet Ins. Co.*, 117 Ill. 2d 18, 24-25 (1987).

Courts are especially wary of admitting testimony where the opinion expressed is that of an individual legislator, offered *after* the passage of the statute. *See Warren v. Borger*, 184 Ill. App. 3d 38, 44-45 (5th Dist. 1989) (statements of individual legislators, made after the passage of a statute, reflect only the viewpoint of those legislators, and not necessarily that of the legislature as a whole on the date the statute was passed). In *State Wholesale Grocers v. A&P Tea Co.*, the district court observed that a legislator's opinions in a book released after he helped co-author the legislation at issue in the case, "should be given no consideration by a court in determining whether there has or has not been a violation of the Act." 154 F. Supp. 471 (N.D. Ill. 1957), *reversed in part on other grounds*, 258 F.2d 831 (7th Cir. 1958). As Illinois state and federal courts have widely held that opinion evidence offered after the passage of legislation is inadmissible to retroactively determine legislative intent, Mr. O'Connor's testimony should be stricken on this basis. The Illinois Appellate Court also noted in *Warren* that even legislators' comments in subsequent floor debates should not factor into a court's interpretation of previously-enacted legislation. 184 Ill. App. 3d at 44-45.[1]

[1] In *People v. Hanna*, the Illinois Supreme Court relied in part on a regulator's in-court testimony in order to interpret a statute he had helped draft on the regulation of police Breathalyzers. 207 Ill. 2d 486, 503 (2003). Even in *People v. Hanna*, however, the court distinguished the type of information that was permissible and did not permit contested interpretations. There the lower courts had suppressed the witness's testimony because he had improperly discussed his own intent in drafting parts of the statute. *Id.* at 493. The Supreme Court then simply noted that as director of the regulatory program for police Breathalyzers, the witness was an expert on how Breathalyzers actually

III. Testimony of Consultants or Lobbyists Regarding Legislative Intent Is Not Admissible.

Courts are even more suspect of the testimony of lobbyists when performing statutory interpretation. The opinions of an industry lobbyist as to the intended meaning of a statute must be zealously barred from any analysis of statutory interpretation in order to prevent lobbyists from achieving an end run around unfavorable legislation. In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, the U.S. Supreme Court stated that "judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members--or, worse yet, unelected staffers and lobbyists--both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." 545 U.S. 546, 568-569 (2005). Courts are loath to admit even contemporaneous evidence of legislative intent that may be corrupted by unreliable or manipulative influences. As the Seventh Circuit has found, "[t]he term 'legislative history' picks up some peculiarly unreliable 'historical' guides to meaning . . . [such as] a passage in a committee report that may have been inserted by a lobbyist or a committee staff member." *Sundstrand Corp. v. C.I.R.*, 17 F.3d 965, 967 (7th Cir. 1994).

In this case, Section 16-125 contains a provision that provides consumers recourse in the event of utility failure. To then permit a utility lobbyist to submit testimony interpreting this protective provision would be a gross injustice. Even without considering the fact that courts have rejected such testimony as inadmissible, there is a clear conflict of interest in this case, especially as Mr. O'Connor is advocating a reading of the protective statute that would leave almost all consumers unprotected. Allowing an industry lobbyist to testify after the fact to legislative intent that potentially eviscerates the protections found in the statute would

---

worked in the real world, and then relied on uncontested parts of the witness's testimony on Breathalyzers to interpret the statutory text. *Id.* at 503.

completely circumvent the legislative process and is anathema to the rules of statutory interpretation.

One Illinois case is particularly on point here. In *Bloomington v. Bloomington Township*, the Illinois Appellate Court upheld the trial court's exclusion of a lobbyist's testimony as to the meaning of a relevant legislative amendment. 233 Ill. App. 3d 724, 736 (4th Dist. 1992). The witness in that case, similar to Mr. O'Connor here, asserted that he could offer helpful insight into the meaning of a particular statutory passage because he "had personally participated in the 1986 legislative process . . . which amended . . . the Act by adding the paragraphs at issue." *Id.* at 735. As the executive director of an association with a stake in the legislative proceedings, the witness in *Bloomington* testified that the statutory language at issue "resulted from a compromise between his association and another association representing the interest of cities," and that the statute should be interpreted in light of this compromise. *Id.* The court upheld the exclusion of that testimony because "judges do not need expert help to merely read statutes" and "legislators and others involved in the legislative process ought not be allowed to testify regarding the meaning of a statute." *Id.* The court further emphasized that "[n]either the disclosed nor undisclosed intent of a legislator or lobbyist becomes *law*; only the bill as it reads when passed becomes law. Allowing tailored court testimony purporting to explain what the legislature *meant* to say is unacceptable and potentially dangerous." *Id.* at 736 (emphasis in original).

The Illinois Appellate Court excluded in *Bloomington* exactly what Mr. O'Connor attempts to suggest through his rebuttal testimony to this Commission. Mr. O'Connor states that he "was centrally involved with the efforts culminating in" the adoption of Section 16-125 of the Act, references a "last minute addition" or deal he claims to have negotiated, and then attempts to explain what the Illinois General Assembly intended when it adopted that

language. ComEd Ex. 6.0 at 6. This testimony, like the testimony in *Bloomington*, *supra*, is improper and should be excluded in its entirety.

IV. Conclusion

It is clear that Mr. O'Connor's testimony is constitutes improper legal opinion testimony by an industry consultant or lobbyist as to past legislative intent behind Section 16-125. As shown above, ComEd's attempt to introduce such testimony into the record goes against well-established precedent that such testimony is inadmissible. Therefore, the People respectfully request that the Commission exclude Mr. O'Connor's testimony in its entirety.

Respectfully submitted,

Cathy Yu

People of the State of Illinois
Lisa Madigan, Attorney General
Cathy Yu, Assistant Attorney General
Susan L. Satter, Senior Assistant Attorney General
Janice A. Dale, Bureau Chief
Public Utilities Bureau
Illinois Attorney General's Office
100 West Randolph Street, 11th Fl.
Chicago, IL 60601
Telephone: (312) 814-8496
Facsimile: (312) 814-3212

Dated: April 23, 2012